IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES M. JEFFERIS,

Plaintiff in Error,

vs.

MAURICE WISE ET AL.,

Defendants in Error.

No. 14.

RESPONDENTS' SUPPLEMENTAL BRIEF.

E. W. McGRAW,
Counsel for Respondents.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

CHARLES M. JEFFERIS,

Defendant and Plaintiff in Error,

vs.

MAURICE WISE ET AL.,

Plaintiff and Defendant in Error.

Supplemental Brief of Defendant in Error.

This cause was on the calendar at the January session of the Court, and briefs were filed on both sides. On motion of defendant in error to dismiss the writ of error for violation of the rule of the Court requiring an assignment of errors to be made in the Court below, prior to allowance of the writ, the motion was denied and the case was continued to the April session with leave to appellant to file assignment of errors and proper brief by March 10th. The assignment and brief have been filed, not, however, in accordance wholly with the rules.

In the printed record the case of the plaintiff in error is exhibited by eight separate and distinct bills of exceptions. In their statement of facts in their brief the counsel for plaintiff in error do not altogether confine themselves to facts which appear in the record. As it will be necessary in the course of our argument to ascertain what facts do appear of record, we do not at this time point out what seem to us to be the errors in the counsel's statement of facts, but proceed at once to reply to their argument in the order in which they have presented it to the Court.

I.

The eighth assignment of error, being the one first discussed by counsel, is founded on their third bill of exceptions. (Record, pp. 38 to 44.)

That bill of exceptions commences thus:

"Be it remembered, that on the trial of the above-entitled action, "had before a court and a jury, on the 5th day of June, 1891, the "defendant, as a part of his cause, offered and introduced testi- "mony of divers witnesses, which was given in evidence tending "to sustain and support the allegations of fraud in the defendant's "answer, amended answer and second amended answer, and suf- "ficient to have required the court to have submitted that issue to "the jury.

"After particular evidence tending to establish all of the allega- "tions of fraud in said pleadings contained had been introduced "and given (and in support of the allegations aforesaid as to the

" writ of attachment under which the defendant took the said chat " tels) he offered and read in evidence a certain undertaking and " writ of attachment," etc., etc.

Thereupon the defendant proceed to offer in evidence the affidavit, bond and writ of attachment under which he justified.

The Court charged the jury that for defect in the undertaking on attachment, the attachment was void and defendant could not justify under it, "and therefore his defense that the mortgage to Oliver " for plaintiffs was fraudulent as to the creditors for whom he acted " fails and you must not consider any of the evidence *upon the point* " *as to whether the mortgage* to Oliver for plaintiffs *was in fraud of* " *creditors or not.*"

It is claimed that under the authority of Matthews *v.* Densmore, 109 U. S., 217, the instruction was erroneous.

If we admit for the purposes of argument that the instruction was erroneous as incorrectly stating an abstract proposition of law, it by no means follows that the judgment should be reversed on that account. The appellate Court will not consider abstract questions not material to any matter in issue.

N. Y., etc., R. R. Co. *v.* Madison, 123 U. S., 524.

The charge to the jury in fact had no relevancy to any issue in the case that was material for the defendant in the case. It was an instruction to the jury to disregard any issue of fraud raised by defendant in his answer. The instruction plainly refers to the issue of actual fraud made by the answer.

Now, the sole issue of frau l raised by the defendant in the Court below is contained in his amended answer to be found on pp. 19 to 20 of the printed record, and which amendment reads as follows, to wit:

" And for further defense this defendant alleges: Upon informa- " tion and belief, that at the date of the execution of said alleged bill " of sale, to wit: On the 18th of March, 1889, said J. E. Lands- " man, or J. E. Landsman & Co., were not indebted to said Wil- " liam Oliver, agent, in any sum exceeding the sum of seven thou- " sand seven hundred forty-one and eighty-seven one-hundredths " dollars, and that immediately after the execution of the said " alleged bill of sale, and upon the same day, the said Oliver used " the same fraudulently and falsely to gain a secret advantage " against other creditors of the said J. E. Landsman & Co., to pro- " tect and insist upon the payment of and through the same to coerce " the payment of fraudulent claims without actual existence against " the said J. E. Landsman & Co., and then and there with the design " of falsely and fraudulently making a large sum of money out of said " bill of sale at the expense of the said J. E. Landsman & Co., and " the creditors of the said firm, refused to surrender the same upon " a tender to him, and an offer to pay the amount so due him in his " representative capacity, and then and there declared that he would " not surrender the same until the sum of twelve thousand five " hundred dollars was paid over to him, thereby using and intend- " ing to use the said alleged bill of sale to work a fraud and extort " money; and that in and about all of the foregoing acts said Oliver

" was acting and assuming to act solely in his representative capac-
" ity and as the agent of these plaintiffs."

The matters therein set up are in no way matters of justification of the defendant. The fraud pleaded is that of an improper use of a valid bill of sale or assignment. It is not claimed by such defense, or any where in the answer, that the bill of sale or assignment under which Oliver received possession of the goods in controversy was fraudulent, but only that Oliver made a fraudulent use of a valid bill of sale and assignment.

The defense set up was one not available. If the allegations of the answer in that respect are admitted they constitute no defense. The defendant, as Sheriff, acting under a writ of attachment against third persons, takes from the possession of plaintiffs below certain property of which they were in possession under a valid conveyance. The validity of the conveyance is not attacked, but it is said the grantee named in the conveyance attempted to use it to extort more money than was due him. But if that be true, it did not affect the validity of the bill of sale. The Statutes of Montana define the instances in which a bill of sale shall be held fraudulent and therefore void.

" Sec. 226. Every sale made by a vendor of goods and chattels
" in his possession or under his control, and every assignment of
" goods and chattels, unless the same be accompanied by the imme-
" diate delivery, and be followed by an actual and continued change
" of possession of the thing sold and assigned, shall be conclusive
" evidence of fraud as against the creditors of the vendor or subse-
" quent purchasers in good faith."

" Sec. 229. Every conveyance or assignment in writing or other-
" wise of any estate or interest in lands, or in goods in action, or of
" the rents or profits thereof made with the intent to hinder, delay
" or defraud creditors, or other persons, of their lawful suits, dam-
" ages, forfeitures, debts or demands, and any bond or evidences of
" debt given, suits commenced, decrees or judgment suffered, with
" the like intent as against the person hindered, delayed, or de-
" frauded, shall be void."

Compiled Statutes Montana, 1887, p. 653.

The defendant does not allege fraud under Sec. 229. He does not allege that the bill of sale was made with intent to hinder, delay or defraud, etc. As we have seen, the only charge is that after the execution of the bill of sale the grantee without so far as is shown any knowledge or concurrence of the grantor, " used the same " fraudulently and falsely." The fact that a mortgage is given for a larger sum than is due does not render it void as to creditors.

Wood *v.* Franks, 67 Cal., 32.

In this case, however, it is not claimed that the mortgage was given for more than was due or that there was any fraud in it, but only that the mortgagee after receiving the mortgage, claimed more to be due than the facts warranted. It is well settled that " the character " of the assignment will not be affected by subsequent events; and " if valid in its creation no subsequent fraudulent or illegal acts of " the parties can invalidate it."

Burrill on Assignments, Chap. XXXII, p. 501.

"As fraud depends on the intent of the debtor it must be in the "inception of the transfer."

Bump, Fraudulent Conveyances, p. 28.

"An assignment honestly made for an honest purpose cannot be "defeated by proof that the assignee abused his trust, misappro- "priated the property, or that he took unwise or even apparently "dishonest means to preserve the property from litigation or levy "by a creditor.'"

Bump, Fraudulent Conveyances, p. 352.

It is absolutely settled that a conveyance is not void under the Statute of Frauds, unless there was a fraudulent intent on the part of the grantor.

Pruett *v.* Wilson, 103 U. S., 222.

It was only this immaterial and irrelevant allegation of fraud that was taken from the consideration of the jury by the Court, and whether or not the Court assigned a valid reason for its action, it is manifest that its action was correct.

An issue was made in the answer under Section 226 of the Statute as to the delivery of the goods under the bill of sale (printed record, p. 14), but that issue was submitted to the jury and the manner of its submission is the subject of two separate bills of exception, IV and V, Record, pp. 44 to 49. The allegations of fraud in the answer were immaterial for any purpose whatever, and the charge of the Court respecting them could have worked no possible injury to defendant.

We have been assuming that the charge of the Court complained of was erroneous as an abstract proposition, but we by no means concede that it was so. The case of Matthews *v.* Densmore, 109 U. S., 216, is relied upon to sustain the position of counsel for plaintiff in error. The consideration of that case involves the questions whether or not it in principle covers the case at bar, and if it does whether this Court is bound by the decision. We think both questions must be answered in the negative.

The case of Matthews *v.* Densmore rested on variant facts from those in the case at bar. In that case a United States Marshal was sued for a wrongful attachment, the writ being issued under the laws of Michigan. In that case the Supreme Court says (p. 218):

"Here, then, we have *a writ fair on its face* issued from a court "which had jurisdiction *both of the parties* and the subject-matter of "the suit in the regular course of judicial proceeding by that Court, "*and which the officer of the Court in whose hands it was placed is* "*bound to obey, and yet* by the decision of the Michigan Court it "affords him no protection when he is sued there for executing its "mandate."

In the case at bar there was no writ fair on its face. The writ issued was not in accordance with the Statutes of Montana. It omitted a very material requirement. (See pp. 20–21 of original brief of defendants in error and also Sprague *v.* Burchard, 4 Wisc., 437; Barbour *v.* Swan, 4 Green (Iowa), 352.) With a writ in his hand which was not a statutory writ, the Sheriff was bound to look into his authority. His exemption from liability under Matthews *v.* Densmore is based

solely on the ground that he had in his possession a writ "fair on its face"—*i. e.*, a writ complying with the statutes under which it was or purported to be issued. In Erskine *v.* Hornbach, 14 Wallace, 616, which was an action brought against a United States Marshal by the defendant in the writ (not as in this case by a stranger to the writ) the Supreme Court, Judge Field delivering the opinion, says:

"If the officer or tribunal possesses jurisdiction over the subject-"matter upon which judgment is passed, with power to issue an "order or process for the enforcement of such judgment, *and the* "*order or process issued thereon to the ministerial officer is regular on* "*its face, showing no departure from the law*, or defect of juris-"diction over the person or property affected, then in such cases the "order or process will give full and entire protection to the minis-"terial officer." There was no such writ in this case.

In the case of Matthews *v.* Densmore the action was against a United States Marshal. The decision goes only to the point of the protection of a United States Marshal in executing process. Citing Cooper *v.* Reynolds, 10 Wall., 308, the Court says:

"The case has been often quoted since, and is conclusive in the "Federal Courts *in regard to the validity of their own processes when* "*collaterally assailed as in the present case.*"

The Supreme Court did not in that case or any other attempt to determine the liability of a Sheriff for a wrongful execution of process.

Even when U. S. process is issued in conformity with laws of the State, the U. S. Courts do not feel bound to follow the decisions of the State Courts as to the effect of the process.

Erustsin *v.* Rothchild, 22 Fed. Rep., 61.

If we concede that there should be on principle no distinction between the liability of a Marshal and a Sheriff, the fact remains that the liability of a Marshal has been determined by the United States Supreme Court under its own views of the laws pertaining to such liability, and that the liability of a Sheriff has been otherwise determined by the Courts of the State under the laws of which the Sheriff exercises his authority.

The question as to the liability of a Sheriff is not a federal question, and however much distate the Supreme Court might entertain for a State *decision* adjudicating that liability under Statute of the State, still the distasteful decision would be followed by the Supreme Court.

The decisions of the State Courts control.

Massey *v.* Allen, 17 Wall., 351.

As to the protection which a writ of attachment furnishes to a Sheriff who levies on property of a third person, the decisions of the Supreme Court of Montana are in harmony with those of all other State Courts and are not in harmony with Matthews *v.* Densmore, as reported in 109 U. S. Reps.

The decisions of the Supreme Court of Montana are emphatic on the proposition that a Sheriff of Montana seizing the property of a person not named in his writ can justify only under a writ which was duly issued.

Hootman *v.* Bray, 3 Mont., 409.
Ford *v.* McMasters, 6 Mont., 240.
Marcum *v.* Coleman, 8 Mont., 196.
Palmer *v.* McMaster, 10 Mont., 390.

Such being the law of Montana it is the law applicable to a Montana case not involving any federal question.

That the attachment was invalid under the laws of Montana as construed by Montana Courts is apparent. (Defendant's opening brief, p. 15, *et seq.*)

Were, however, the decision of Matthews *v.* Densmore precisely in point on this case, this Court is under no obligation to follow it. With regard to this case this Court has all the powers which the Supreme Court would have had if this Court had not been created. It has the same power which the Supreme Court has to overrule an erroneous decision of that Court. This must necessarily be so to enable the Court to render exact justice, as its judgments are final. On any other theory erroneous construction of the law that has been made by the Supreme Court in the class of cases over which this Court has now sole appellate jurisdiction, is beyond the reach of correction. A decision of the Supreme Court is by no means infallible, and it is to the credit of that Court that it is always ready to acknowledge and correct the errors into which it has fallen. It not infrequently exercises the power of overruling, questioning, modifying or explaining its previous decisions.

For a few of the many instances of the exercise of this power, see

Morgan *v.* U. S., 113 U. S., 476.
Barron *v.* Burnside, 121 U. S., 186.
P. & S. S. Co. *v.* Pennsylvania, 122 U. S., 326.
Hans *v.* Louisiana, 134 U. S., 624.
Laisy *v.* Hardin, 135 U. S., 100.

For reasons which we have heretofore given we do not think the decision of Matthews *v.* Densmore is material in this case. If the Court should think otherwise we respectfully ask that that decision be overruled. The case stands alone, opposed by the opinions of the text writers and the decisions of the highest Courts of New York, Massachusetts, Michigan, Missouri, Nebraska, Nevada, Minnesota, Montana, California and Alabama. (See cases cited pp. 13 to 15, original brief of defendants in error, to which may be added Keys *v.* Granniss, 3 Nevada, 548; Noble *v.* Holmes, 5 Hill, 194; Hines *v.* Chambers, 29 Minn., 7; Howard v. Manderfield, 31 Minn., 338; Homberger v. Brandenberg, 35 Minn., 401; State *v.* Rucker, 19 Mo. App., 587; Oberfelder *v.* Kavanah, 21 Nebraska, 483; Williams *v.* Eikenberry, 25 Neb., 721; S. C., 13 Am. St. Rep. 517; Besbe *v.* Morrell, 76 Mich., 114; S. C., 15, Am. St. Rep. 288; Cooley on Torts, 463; Horn *v.* Coravarubias, 51 Cal., 524; Saxby *v.* Adkinson, 34 Cal., 349; Brichman *v.* Ross, 67 Cal., 602, and Montana cases heretofore cited.) If any case can be found in the reports which is in accordance with Matthews *v.* Densmore, it is one which no counsel on either side of this case has been able to find. That case was decided Nov. 12, 1883. It has been absolutely without influence. It has not been followed in any subsequent case. The following later cases adhere to the old and correct rule:

Howard *v.* Manderfield, 31 Minn., 338, decided Dec. 29, 1883.
State *v.* Rucker, 19 Mo. App., 587, decided Dec., 1885.
Homberger *v.* Brandenberg, 35 Minn., 401, decided July, 1886.
Oberfelder *v.* Kavanah, 21 Nebraska, 483, decided January, 1887.
Brichman *v.* Ross, 67 Cal., 602, decided October, 1885.
Palmer *v.* McMaster, 10 Montana, 390, decided January, 1891.
Daniel v. Hardwick (Ala.), 7 Southern, 188, decided Jan., 1890.
Trowbridge *v.* Bullard (Mich.), 45 N. W., decided June, 1890.
Williams *v.* Eikenberry, 25 Neb., 721, decided Jan., 1889.
Beebe *v.* Morrell, 76 Mich., 114, decided June, 1889.

The reasons given for the decision of Matthews *v.* Densmore will on investigation be shown without foundation. His Honor, Judge Miller, rendering the decision, says as to the writ of attachment: "When in the hands of the officer *who is bound to obey it*, with the "seal of the Court and everything else on its face to give it validity, "if he did obey it and is guilty of no error in this act of obedience, "it must stand as his sufficient protection in all other Courts." (p. 219.)

The learned Judge assumes that it was the duty of a Sheriff under a writ of attachment to levy on property in the possession of a stranger to the writ and claiming to own the property.

We do not so understand the law. The same learned judge who wrote the opinion in Matthews *v.* Densmore had personally rendered an opinion in all respects accordant with our understanding of the law. He said:

"How far the Courts are bound to interfere for the protection of "their own officers, is a question not discussed in the case of Free- "man *v.* Howe, but which demands a passing notice here. In its "consideration, however, we are reminded at the outset that prop- "erty may be seized by any officer of the Court under a variety of "writs, orders or processes of the Court. For our present purpose "these may be divided into two classes:

"1. Those in which the process or order of the Court describes "the property to be seized, and which contain a direct command to "the officer to take possession of that particular property. Of this "class are the writ of replevin at the common law, orders of seques- "tration in chancery, and nearly all the processes of the Admiralty "Courts, by which the *res* is brought before it for its action.

"2. Those in which the officer is directed to levy the process "upon property of one of the parties to the litigation, sufficient to "to satisfy the demands against him, without describing any speci- "fic proparty to be thus taken. Of this class are the writ of attach- "ment, or other mesne process, by which property is seized before "judgment to answer to such judgment when rendered, and the "final process of execution, elegit, or other writ, by which an ordi- "nary judgment is carried into effect.

"It is obvious, on a moment's consideration, that the claim of "the officer executing these writs, to the protection of the Courts "from which they issue, stands upon very different grounds in the "two classes of process just described. In the first class he has "no discretion to use, no judgment to exercise, no duty to perform

"but to seize the property described. It follows from this, as a "rule of universal application, that if the Court issuing the process "had jurisdiction in the case before it to issue that process, and it "was a valid process when placed in the officer's hands, and that, "in the execution of such process, he kept himself strictly within "the mandatory clause of the process, then such writ or process is "a complete protection to him, not only in the Court which issued it, "but in all other Courts.

"And in addition to this, in many cases the Court which issued "the process will interfere directly to protect its officers from being "harassed or interfered with by any person, whether a party to the "litigation or not. Such is the habitual course of the Court of "Chancery, operating by injunction against persons who inter- "fere by means of other Courts. And instances are not wanting "where other Courts have in a summary manner protected their "officers in the execution of their mandates.

"It is creditable, however, to the respect which is paid to the "process of Courts of competent jurisdiction in this country, that "the occasion for the exercise of such a power is very rare.

"In the other class of writs to which we have referred, the officer "has a very large and important field for the exercise of his judg- "ment and discretion. *First*, in ascertaining that the property on "which he proposes to levy is the property of the person against "whom the writ is directed; *Secondly*, that it is property which, "by law, is subject to be taken under the writ; and *Thirdly*, as to "the quantity of such property necessary to be seized in the case in "hand. In all these particulars he is bound to exercise his own "judgment, and is legally responsible to any person for the conse- "quences of any error or mistake in its exercise to his prejudice. "He is so liable to plaintiff, to defendant, or to any third person "whom his erroneous action in the premises may injure. And "what is more important to our present inquiry, the Court can "afford him no protection against the parties so injured, for the "Court is in no wise responsible for the manner in which he exer- "cises that discretion which the law reposes in him, and in no "one else.

"In the case before us, the writ under which the defendant justi- "fied his act and now claims our protection, belongs to this latter "class. Yet the plea on which he relied contains no denial that "the property seized was the property of plaintiff, nor any aver- "ment that it was the property of either of the defendants in the "attachment suit, or that it was in any other manner subject to "be taken under that writ."

Buck *v.* Colbath, 3 Wallace, 342 *et seq.*

In a still earlier decision the Supreme Court had rendered a decision in accordance with the views which we now advocate:

"Where a Court has no jurisdiction over the subject-matter it "tries and assumes it; or where an inferior Court has jurisdiction "over the subject-matter, but is bound to adopt certain rules in its "proceedings, from which it deviates, whereby the proceedings are "rendered *coram non judice*.' * * * "In both cases the law is, "that an officer executing the process of a Court which has acted

" without jurisdiction over the subject-matter becomes a trespasser, " it being better for the peace of society and its interests of every " kind that the responsibility of determining whether the Court has " or has not has not jurisdiction should be upon the officer, rather " than that a void writ should be executed."

Dynes *v.* Hoober, 20 How., 80.

The writ relied on in the present instance was against J. E. Landsman & Co. (Printed Record, pp. 38 to 41.) When the Sheriff attempted to levy the writ he found the property on which he wished to levy in the possession of agent of plaintiff in this action. (Printed Record, pp. 46, 47 and 56 to 61.) Under these circumstances the writ of attachment did not compel him to levy on these goods. His duty to levy then was dependent on the subsequent fact that the plaintiff in the attachment case would give him a bond of indemnity. Without such bond he might refuse to attach the goods. Note to Spangler *v.* Commonwealth, 16 Am. Dec., 551, and cases cited. And see later cases:

Long *v.* Neville, 36 Cal., 455.

Patterson *v.* Anderson, 40 Pa. St., 359.

And even after indemnity given he may refuse to levy if he believes the goods to belong to the third person.

Coville *v.* Bentley, 76 Mich., 248.

S. C., 15 Am. St. Rep., 312, and note.

In this case it appears that the Sheriff did, in fact, take such indemnity bond before he would levy on the goods in controversy. (Printed Record, p. 59.) So the writ of attachment did not alone compel him to make the levy complained of; another instrument, a bond of indemnity, was necessary. The Sheriff was put on his guard; he was required to look into the validity of his process and was excused from proceeding under it unless he was indemnified for all damages he might suffer. Under these circumstances it appears idle to say that a writ in proper form against a defendant in an action would justify him in seizing some other person's property. He has become something more than an officer of the law—he has also become the agent of plaintiff in the attachment suit.

There is another very material matter not at all considered in Matthews *v.* Densmore, which is thus formulated by a noted commentator.

" Upon principle it would seem that as the protection given to " an officer by process fair on its face, is solely for his benefit, he " may waive it by not standing on the process, but undertaking to " prove that the proceedings were in fact regular, so that if he " should fail in the attempt he could not afterwards rely on the " regularity of the process."

Mr. Freeman's notes to Savacool *v.* Boughton, 21 Am. Dec., 204.

The defendant in his answer (Record, p. 15) justifies upon the ground that he acted under writs of attachment " regularly issued out of the District Court of the then Territory of Montana, in and for Lewis and Clarke County, which said writs had been regularly issued," etc.

It will be observed that he relied upon writs regularly issued. In his proof, he offered the undertaking, affidavit, complaint and sum-

mons to show the regularity of the issue. The case was tried upon the theory that the defendant relied upon writs regularly issued, and it was not until it appeared to the Court by the defendant's own evidence that the writs were not regularly issued, that defendant was deprived of his alleged justification.

In Beam *v.* McCumber, 35 Mich., 257, the Court say:

"A party cannot get relief on one basis, and then seek a new chance to litigate on the suggestion that he has a defense that he did not see fit to rely on before."

Belanger *v.* Hersey, 90 Ill., 73.

Sweezy *v.* Stetson, 67 Ia., 481.

In the case of Railway Co. *v.* McCarthy, 96 U. S., 267, the Court say:

"Where a party gives a reason for his conduct and position touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and different consideration. He is not thus permitted to amend his hold; he is estopped from doing it by a settled principle of law."

Therefore, after the defendant had gone on and shown all the proceedings, he cannot now be heard to assert that if he had not shown those proceedings to have been irregular matters, there would have been no merit in plaintiff's contention that the writ furnished him no justification.

Clark *v.* Child, 66 Cal., 87.

In this case the Sheriff undertook to prove the regularity of his process and failed in his proof.

The decision of the Supreme Court of California in Brichman *v.* Ross, 67 Cal., 605, answers a number of pages of argument of opposing counsel in this case. The Court says:

"The reason for the distinction between cases where the writ is "levied upon property in possession of the defendant in the writ, "and where the property is found in possession of a stranger to the "writ, is found in the fact that the *defendant* may, if the attachment "has been improvidently issued, move to have it quashed or have "an action upon the undertaking, while a third party, a stranger to "the writ and the record, could not be heard for such purpose; "hence, the justice of requiring an officer who takes property, not "from the defendant against whom the writ issues, but from the "possession of a stranger, whom the law presumes to own it, to "show not only his writ, but that it issued regularly upon a valid "demand against the defendant named in such writ."

The decision of Matthews *v.* Densmore goes to the extent of allowing any one who sues out an attachment, legal or illegal, and whether or not he is a creditor of the defendant named in the writ, on the mere production of a writ in the hand of a Sheriff to question the good faith of a conveyance from the defendant named in the writ, to a third party.

We respectfully submit that Matthews *v.* Densmore does not correctly state the law and should be overruled.

II.

The learned counsel decline to argue their first assignment of error. We submit it on their argument or want thereof.

III.

The second assignment of error is based on the order of the Court below, allowing plaintiffs to file an amended replication. (Printed Record, p. 56 to 61.) We confess our inability to comprehend the argument of counsel on that point. Without attempting to follow it in detail, the argument seems to be that the amended replication introduced a new cause of action and deprived the defendant of material defense. The learned counsel seem to have a very singular idea of the office and effect of a replication.

The replication was merely a denial of new matter in the answer, and it is absolutely impossible for a replication to change the nature of an action or to deprive a defendant of any defense. The Statutes of Montana relating to the matter read as follows:

"Sec. 94. When the answer contains new matter the plaintiff "may, within ten days from the date of filing such answer, reply "thereto." Compiled Stats. Montana, p. 83.

"Sec. 109. The statement in the replication of matter in avoid- "ance shall on the trial be deemed controverted by the adverse "party." Compiled Statutes Montana, p. 87.

The allowance of the amendment was within the discretion of the Court and no facts appear in the record from which it can be inferred that the discretion was not properly exercised.

IV.

The third assignment of error is "error of the Court in overruling "the motion of plaintiff in error for a verdict." (Printed Record, p. 62.) This comes under Bill of Exceptions VIII. On page 61 of Record it appears the defendant moved the Court to find a verdict for defendants on a number of grounds, the facts as to no one of which are embodied in that bill of exceptions. The bill of exceptions does not purport to set forth all the testimony given.

The learned counsel say in support of that assignment of error: "As the case stood under the proofs before the amendment the "Court was without jurisdiction."

The record, however, shows no such proofs; there was no proof nor was there any claim in the answers that the defendant was not in possession at the commencement of this action, nor that at that time he held possession by virtue of any process whatever. The argument of counsel is a *felo de se*. If the Court had no jurisdiction it would certainly have been grossly improper to have granted defendant's motion and ordered a verdict from the jury.

The grounds on which the counsel claim there was a want of jurisdiction in the Court below is that a U. S. Marshal cannot take property from a Sheriff holding it under State process. They cite

Covell *v.* Heyman, 111 U. S., 176.
Freeman *v.* Howe, 24 How., 450.
Taylor *v.* Carryl, 20 How., 583.

As already stated the facts of this case do not bring it within those decisions. It is not alleged or proved that at the time this action was commenced the Sheriff held the property by virtue of any process from a State Court. But were it otherwise, the doctrine of those cases has been very much modified by the case of

Wood *v.* Weimar, 104 U. S., 786.

This was an action of replevin brought in the U. S. Circuit Court for Michigan under which the U. S. Marshal took from the possession of a Sheriff goods held by him under process issued from a State Court. The Supreme Court held the action would lie because the Supreme Court of Michigan had recognized the liability of a Sheriff to be sued in replevin.

The Supreme Court of Montana has also recognized such liability.

Griswold *v.* Boley, 1 Montana, 546.
Caldwell *v.* Gans, 1 Montana, 573.
Ford *v.* McMarter, 6 Montana, 240.
Parrott *v.* Scott, 6 Montana, 340.

And the ~~Superior~~ Court of the United States has twice recognized such liability on the part of a Montana Sheriff.

Boley *v.* Griswold, 20 Wall., 486.
Sweeney *v.* Larney, 21 Wall., 208.

In addition to the decisions of the Supreme Court of Montana, we find that the Statute of Montana expressly recognizes the propriety of this class of actions. In the chapter relating to the claim and delivery of personal property, there is a section which reads as follows:

Sec. 163. " In case such action to recover personal property shall " be brought *against any sheriff or other officer who may have levied* " *upon or seized the same under authority of any attachment* or other " process, and judgment shall be rendered in favor of such officer " for the return of the property, the party against whom such judg- " ment shall be rendered may nevertheless make return of said " property, notwithstanding the same may have been injured or " lessened in value, and thereupon it shall be the duty of such " officer to immediately advertise the same for sale as in cases of " sale of personal property under execution, and apply the proceeds " of the sale thereof, after paying the costs, towards the payment " and satisfaction of any judgment that may have been rendered."

Construing Wood *v.* Weimar in connection with above cited cases in the Supreme Court of Montana and the cases in 20th and 22nd Wallace and the Statute of Montana, it is very evident that in Montana an action of claim and delivery will lie against a Sheriff for the recovery of personal property wrongfully attached.

The principle announced in Covell *v.* Heyman and kindred cases is not applicable to the case at bar. Covell *v.* Heyman was a writ of error to the Supreme Court of the State of Michigan, in which State the common law practice still prevails. In that case a Marshal of the United States, under execution issued out of a U. S. Court, had seized certain property as that of the judgment debtor, a third person brought replevin for the property in a State Court. The Marshal pleaded his writ and possession under it. Held, a

good defense, but not because of any privilege of the Marshal. On the contrary, the Court cites with approval Buck *v.* Colbath, 3 Wallace, 334, in which it is held that the Marshal seizing under a writ the property of a third person, becomes at once liable to that person for a wrongful conversion. But the Court places its decision on this ground, quoting the opinion of Mr. Justice Miller in Buck *v.* Colbath.

"That principle is, that whenever property has been seized by "an officer of the Court, by virtue of its process, the property is "to be considered as in the custody of the Court and under its "control for the time being; and that no other Court has a right to "interfere *with that possession*," &c. (p. 180), and on page 184 the Court says, that his writ "furnishes to the officer complete im- "munity from the process of every other jurisdiction *that attempts* "*to dispossess him.*"

Freeman *v.* Howe was a writ of error to the Supreme Court of Massachusetts, also a State in which the common law practice still prevails; the facts were precisely similar to those in Covell *v.* Heyman.

Taylor *v.* Carryl was a writ of error to the Supreme Court of Pennsylvania. A Sheriff, under process from the State Court, had attached and held in his custody a vessel. A suit in admiralty was commenced against the vessel in the U. S. District Court, and process issued out of the Court commanding the Marshal to seize the vessel. The question was, which had the better right to the vessel, the Marshal or the Sheriff, and the right of the Sheriff was held the better, four judges of the nine dissenting.

In each of these cases an absolute dispossession of the officer first making the seizure was had or contemplated. A replevin suit in Michigan or Massachusetts presumably retains the common law features of such an action. It was originally an action in rem, commenced by original writ and the first step seizure of the goods by the Sheriff and delivering of them to the plaintiff. The judgment, if in favor of the plaintiff, was for damages for the taking; if for the defendant, it was for the return of the property, damages, &c. The decisions of the Supreme Court have reference to this action of replevin, in which, *ex necessitate*, it was contemplated to dispossess the officer of the goods.

There is no action of replevin in Montana. The code action of claim and delivery, which is a very different proceeding, takes its place.

The Statutes of Montana provide as follows:

Sec. 156. "The plaintiff in an action to recover personal prop- "erty, *may*, at the time of issuing summons, or at any time before "answer, claim the delivery of such property to him as provided "in this chapter."

Sec. 157. "When a delivery is claimed an affidavit shall be "made by the plaintiff or some one in his behalf stating," etc., etc.

Sec. 158. "The plaintiff or his attorney, may thereupon by

" indorsement in writing upon the affidavit, require the Sheriff of " the county where the property may be to take the same from the " defendant."

Compiled Statutes of Montana, p. 97.

Sec. 303. " In an action to recover the possession of personal " property, judgment for the plaintiff may be for possession or the " value thereof, in case a delivery cannot be had, and damages for " the detention," &c.

Compiled Statutes of Montana, p. 137.

This action then of claim and delivery, is a combination of the essential features of replevin, detinu and trover. If the defendant has disposed of the property prior to suit brought, the complaint may be amended so as to make it purely an action of trover.

Forsyth *v.* Bowen, 54 Cal., 639.

The action does not necessarily contemplate an actual seizure of the goods. They were not seized in this case. The judgment contemplates that the goods may never come into the possession of the plaintiff; the defendant may dispose of them pending suit; the defendant may show that he holds them as U. S. Marshal by virtue of process issued out of a U. S. Court; in such cases an actual delivery could not be had, and under those circumstances the Court might in Montana render only a money judgment for the value of the goods and damages.

Boley *v.* Griswold, 20 Wall., 486.

McGraw *v.* Franklin, 25 Pac., 911.

Or the Court could render the statutory alternative judgment, which could be enforced only as a money judgment.

Under these circumstances it is apparent that an officer lawfully in possession of goods, could not be unlawfully dispossessed of them in such statutory action of claim and delivery, and that such action could be maintained against an officer where an action of replevin would fail.

The original brief of defendants in error, p. 27, affords a conclusive answer to this assignment of error on other grounds.

V.

The fourth assignment of error is as to the ruling of the Court in sustaining objection of plaintiffs below to certain evidence as to the appointment of a receiver to take the goods in question in this action, "and the surrender and delivery of said goods to such receiver by the plaintiff in error."

This assignment of error is to be disregarded under rules 11 and 24 of this Court, as it fails to quote the full substance of the evidence rejected.

In the Record, pp. 51 to 56, we find the assignment to be more comprehensive than the facts warrant.

Certain papers were offered in evidence:

1st. Ordinary complaint in *assumpsit* in case of Max Sternberg *v.* J. E. Landsman to recover $1,966, and summons issued thereon.

2d. A petition in said case by the plaintiff reciting that he is a judgment creditor of J. E. Landsman; that in March, 1889, the First National Bank of Helena commenced an action against J. E. Landsman and one Julius Cohen; that a writ of attachment issued in said action under which a stock of goods in the possession of J. E. Landsman was attached; that prior to the attachment Landsman had purchased the interest of Cohen; that other attachments, some twelve or fourteen in number, were levied on said goods; that the Sheriff is now in possession; that if said stock of goods is sold by the Sheriff enough would be realized to pay only two of the attaching creditors; that if the Court will appoint a receiver of said property "sufficient money could be realized to pay a great proportion of "the claims of said attaching creditors, and that it is for the best "interests of said attaching creditors to have such receiver appointed; "that the attorneys for the attaching creditors have executed a stipu- "lation attached; that Marcus Lisser is a fit and proper person to be "receiver; that the goods are of the value of about $22,000. Where- "fore he prays that a receiver be appointed," etc.

3d. Order of Henry N. Blake, Judge, appointing Marcus Lisser receiver, and that Sheriff turn over goods to him.

4th. Oath of Marcus Lisser that he will well and faithfully perform the duties of receiver.

5th. Bond of Marcus Lisser as receiver.

The defendant further offered to prove that in accordance with the order, on April 19, 1889, he turned over the "said property and the "whole thereof to the said receiver, so named, and never since has "held or possessed the same."

Plaintiff objected to the introduction of "*said papers*" on the ground that the entire record should go in, if any of it went in, and because the papers were irrelevant and immaterial under the issues, and the Court very properly sustained the objection.

It will be observed that there was no objection made to the offer to prove that the defendant had in fact delivered said goods to Lisser, and never got them back, and it is to be presumed that the defendant made such proof as he could of those facts, and if they are at all material that the jury found against him.

The papers offered in evidence and rejected are the most remarkable documents that ever emanated from a Court. A, B, C, D, E and F, etc., bring their several actions against G and H to recover money, issue attachments against property of G and H, under which goods are attached. Afterwards J brings his action in *assumpsit* against G. What became of the action does not appear. Perhaps the defendant recovered judgment. J then appears as the friend of the attaching creditors A, B, C, D, E and F, etc., and files a petition in his own action of *assumpsit* to which neither the attaching creditors nor H, one of the debtors, are parties, and without notice to any one, represents that it is to the interest of the attaching creditors that the goods they have attached should be

put into the hands of a receiver, and the judge obligingly makes an order appointing a receiver, and orders the Sheriff to turn over the attached property to him. A more flagrant case of a common law Court making an order utterly beyond its jurisdiction cannot be conceived. The whole proceeding was *coram non judice*. The order made could be no protection to the Sheriff under any conceivable state of facts. If there were no other good reason for the ruling of the Court below, the absolute worthlessness of the "papers" offered was a sufficient one.

It is reasonable to suppose that its absolute want of jurisdiction to make such an order, must have become apparent to the Court that made it, and that the order was revoked. Hence the importance of the objection that the whole record should have been offered.

But if there had been a valid order for the appointment of a receiver and the Sheriff obeyed it, it would not avail him.

Norris *v.* McComa, 29 Fed. Rep., 757.

Duke *v.* Vincent, 29 Iowa, 308.

Upon this point we also refer to original brief of defendant in error, pp. 28, 29.

We have examined the cases referred to on pp. 27, 28, of brief of opposing counsel. Neither of those cases has the most remote bearing on any question now before the Court.

VI.

The fifth assignment of error is to the charge of the Court (Record, p. 45) as follows: "But the defendant has returned upon "the writ of attachment under which he claims to have taken this "property, that he took it from the possession of Oliver, who was "the agent of plaintiffs. This I instruct you would preclude him "from maintaining that Oliver was not in possession of the goods "at the time he took them."

There are two answers to this assignment, each one of which is conclusive:

1st. It does not appear that there was any testimony in the case contradicting the Sheriff's return that he took the goods from the possession of Oliver.

2d. That the instruction was correct. See original brief of defendant in error, pp. 10–12. Also

Harvey *v.* Foster, 64 Cal., 296.

Boone Co. v. Lowry, 9 Mo., 23.

Egery *v.* Buchanan, 5 Cal., 54.

McClelland *v.* Shingaff, 7 Watts. & S., 134.

VII.

The sixth assignment of errors as to instruction of Court relative to change of possession is fully covered by our original brief, pp. 29 to 35. We may add that the fifth bill of exceptions on which this assignment is found does not purport to set out all the testimony referring thereto, and it is impossible to say that defendant below was damaged by the instruction, even if it had been erroneous.

VIII.

The seventh assignment of errors is based on the sixth bill of exceptions. (Record, p. 49.) It is based solely on this fact that the instruction complained of fails to instruct the jury as to the evidence of Landsman that the bill of sale to Oliver was not intended to secure the claim of Turner & Burleigh.

The assignment fails for two reasons:

1st. It does not appear that the Court did not fully instruct the jury as to that matter in some other instruction.

2d. That it appears by the bill of exceptions that the bill of sale showed on its face that it was intended to secure the claim of Turner & Burleigh.

No doctrine can be better settled than that the intention of a written instrument is to be arrived at by inspection of the instrument and that parol evidence of the intention is inadmissible.

2 Whart. Ev., §926.

Welton *v.* Palmer, 39 Cal., 456-8.

IX.

The learned counsel for plaintiff in error discuss and in their brief seem to rely upon some points which do not properly arise in the record.

In urging their exception to the ruling of the Court, allowing plaintiffs below to file an amendment to their replication, they assume as a fact, that the Sheriff, before levying on the property, tendered the plaintiffs the sum due them, and proceed to argue, that, therefore, the seizure was lawful. What that has to do with the exception which is the basis of these remarks is not apparent. The argument, however, has no foundation in the record. They say there was no evidence introduced by plaintiff to show that such tender was *not* made. Clearly we were not called upon to prove the negative of an affirmative defense of defendant. But for anything that appears in the record to the contrary, we did make precisely that negative proof. The pleadings also negative the possibility of such a tender. The answer (page 19) avers that J. E. Landsman & Co. were not indebted to the plaintiffs in a sum exceeding $7,741 $\frac{87}{100}$, and that plaintiffs refused a tender "*of the amount so due.*" But the jury found that the amount due was, in fact, a larger sum than that claimed to have been tendered, to wit, $7,850 $\frac{66}{100}$.

Assuming a statutory tender, neither pleaded or in evidence, the counsel next proceed to argue a point not made in the Court below or assigned as error in this Court, to wit: that the only remedy the plaintiffs had was an action against the Sheriff on his bond. Such, however, is not the law. Woods *v.* Frank, 56 Cal., 218, cited by the counsel, decides merely that the mortgagee *may* sue on the bond, and is not left to his action of trover or replevin.

But either trover or replevin will lie.

Irwin *v.* McDowell, 91 Cal., 119.

Sherman *v.* Finch, 71 Cal., 68.

Merrell *v.* Denton, (Mich.) 41 N. W., 823.

Gamble *v.* Wilson, (Neb.) 50 N. W., 3.
Stevenson *v.* Lord, (Colo.) 25 Pac., 313.
Rankin *v.* Green, (Kans.) 16 Pac., 680.

In fact, such action is so far privileged, that *replevin will lie in a United States Court on behalf of a mortgagee against a Sheriff, who has seized the mortgaged property under writs of attachment issued out of a State Court.*

Wood *v.* Weimer, 104 U. S., 786.

We respectfully submit that not only should the judgment be affirmed, but that this is a proper case of awarding damages for a frivolous appeal.

Respectfully submitted,

E. W. McGRAW,
Counsel for Defendants in Error.

In the United States Circuit Court of Appeals, Ninth Circuit.

MAURICE WISE ET AL.,
Plaintiffs, (Defendants in Error,)
vs.
CHARLES M. JEFFERIS,
Defendant, (Plaintiff in Error.)

No. 14.
Filed July 18, 1892.

Toole & Wallace and W. S. Wood, for Plaintiff in Error,
Cullen, Sanders & Shelton and E. W. McGraw, for Defendants in Error.

Before GILBERT, Circuit Judge, and DEADY AND HAWLEY, District Judges.

HAWLEY, J.

This suit was commenced in the United States Circuit Court of Montana, on the 22d day of October, 1890, for the recovery of the possession of certain goods and personal property, or for the value thereof in case a delivery could not be had. The cause was tried before a jury, and a verdict found in favor of the plaintiffs.

It appears, from the record, that on the 18th of March, 1889, and prior thereto, J. E. Landsman, as the successor of Landsman & Co., was conducting and carrying on the business of a clothing store in Helena, Montana; that Landsman & Co. were indebted to the First National Bank of Helena in the sum of about eight thousand dollars; also indebted to the plaintiffs in this suit, Wise, et al., designated as Chicago creditors, in the sum of about seven thousand, seven hundred dollars, and indebted to divers other creditors in the aggregate amounting to over ten thousand dollars; that on the morning of the 18th of March, 1889, the Chicago creditors and plaintiffs, Turner & Burleigh, procured from said Landsman a bill of sale of all the merchandise, store, fixtures, and firm assets of Landsman & Co. for a consideration as expressed in the bill of sale of twelve thousand, five hundred dollars; that the bill of sale was, by agreement of parties, made to William Oliver, who acted as the agent of the plaintiffs in this suit. That said Oliver took possession of said goods and store for said parties. That in the afternoon of said day Charles M. Jefferis, defendant herein, as Sheriff of Lewis & Clarke County, Montana, levied, seized upon, and took possession of said stock of goods, under and by virtue of a certain writ of attachment issued out of the District Court, in and for Lewis & Clarke County, Montana, in a suit

brought by the First National Bank of Helena against J. E. Landsman & Co. That at the time of this levy the said Oliver demanded from Jefferis the possession of said goods which was refused. That the return upon said writ of attachment, as made by Jefferis, states that he attached the property "in the possession of William Oliver." During the trial of the case it appeared from the evidence that the Bill of Sale was given to Oliver as security for the indebtedness due from Landsman & Co. to the Chicago plaintiffs in the sum of $7,741.81, and the indebtedness due to Turner & Burleigh, the other plaintiffs, in the sum of $108.85 or thereabouts, and it was treated throughout the trial as a chattel mortgage.

Numerous Bills of Exceptions were taken at different stages of the trial, and there are several specific assignments of error, some of which relate to and are dependent upon the character and condition of the pleadings and others to the instructions and rulings of the Court. The pleadings of both parties were, at different times, by leave of the Court, amended in several particulars. In the original answer Jefferis alleged that all his acts were performed solely in his official capacity as Sheriff and in the performance of duties enjoined upon him by law; that he levied upon and took possession of said goods under the writ of attachment in the suit of the First National Bank of Helena vs. Landsman & Co., and retained possession thereof until the 20th of April, 1889, "when he was superseded in possession thereof by one Marcus Lissner, who was duly appointed a receiver with full power and authority to receive, take hold and dispose of the said goods in a certain suit and action wherein Max Sternberg was plaintiff and J. E. Landsman & Co. were defendants."

Upon the trial, Jefferis offered the complaint and attachment in said suit, the petition of Plaintiff Sternberg, the order of the Judge appointing the receiver, and the oath and bond of the receiver. The admission of these papers as evidence was objected to upon the ground that if a portion of the record in the case was to be introduced the entire record should go in, and for the further reason that the papers offered were irrelevant and immaterial under the issues. Which objection was properly sustained by the Court.

If the Sheriff wrongfully seized the property in the first instance his liability was then incurred, and he could not relieve himself from such liability by proof that he subsequently delivered the property to another person upon the order of the Court made in the suit to which plaintiffs were not parties. "The action is for a trespass, and the wrong doer cannot avoid liability by handling the fruits of his trespass or wrong over to another." Duke vs. Vincent, 29 Iowa, 309.

The plaintiffs, having acquired a right of action, could not be held to have lost it under such circumstances and the defendant was not discharged from any responsibility which he had incurred. Livermore vs. Northrup, 44 N. Y. 112. At the close of the testimony upon the part of plaintiffs the defendant Jefferis moved for a nonsuit, which he subsequently, by leave of the Court, changed to a motion to instruct the jury to find a verdict for defendant. This motion was denied. Thereupon plaintiffs obtained leave of the Court to file an amendment to their replication to defendant's answer. This amendment, among other things, alleged that the defendant had levied upon the goods in question under the writ of attachment issued in the suit of the First National Bank of Helena vs. Landsman & Co., and that said suit had been terminated and completed by the rendition of judgment therein and that said judgment had been fully satisfied and discharged long prior to the commencement of this suit and that said property having been disposed of was no longer held under or by virtue of any process of the State Court, and that all interest which said Court ever had in and to said property had long since ceased and terminated. The contention of Jefferis is that the Court erred in refusing to grant his motion because, as the evidence and pleadings then stood, it appeared that the goods were in possession of the State Court and therefore it is argued that the United States Circuit Court had no jurisdiction of the case.

The record does not purport to contain the evidence offered by plaintiff, and in the absence of such a statement it would be our duty to presume that there was evidence sufficient to sustain the action of the Court. It is, however, unnecessary to discuss that question as we are of opinion that the Court did not err in allowing the amendment to the replication, setting up the true state of facts concerning the possession and disposition of the goods and even if the Court erred in denying the motion the error was cured by allowing the amendment and by subsequent proofs offered by both parties.

It is always within the discretion of the Court to allow amendments to the pleadings, at any stage of the trial, so as to conform to the truth. But it is contended by Jefferis that the allowance of the amendment changed the cause of action and worked a vital injustice to him; in this, that the cause of action as originally brought was against him as an individual and that the amendment introduced a new cause of action against him as an officer; and reference is made to Section 1546, Compiled Statutes of Montana, which provides that

"personal property mortgaged may be taken on attachment or execution issued at the suit of a creditor of the mortgagor, but, before the property is so taken the officer must pay or tender to the mortgagee the amount of the mortgage, or must deposit the amount with the County Treasurer of the county in which the mortgage is filed, payable to the order of the mortgagee."

Counsel assumes the facts to be that Jefferis, before levying on the property tendered plaintiffs the sum due them and thereupon claims that the seizure was lawful under the statute and that the only remedy which plaintiffs had was an action against Jefferis on his official bond as Sheriff; and rely upon Wood vs. Frank, 56 Cal. 218, in support of their views. It is a sufficient answer to the argument of counsel upon this point to say (1) that there are no proofs in the record that any tender was made; (2) that the amendment did not introduce any new or different cause of action. It was simply an additional replication to the new matter set up in defendants' answer for the purpose of allowing evidence to be introduced showing that the goods and personal property had been disposed of, and were not, at the time of the commencement of this action, in the custody of, or under the control of, the State Court, or that defendant held the property by virtue of any process of the State Court.

Plaintiffs were not confined to the remedy afforded by an action upon the official bond of Jefferis. From the facts of this case as they appear in the record they were entitled to recover in the form of action chosen by them, although they might have obtained their rights in another and different form of action, Lammon vs. Fusier, 111 U. S.

The defendant, Jefferis, having levied upon and taken the property of a stranger to the writ, if unable to justify his taking, might be sued therefor in any form of action which the party whose rights had been invaded might elect to pursue. 2 Freeman on Ex. S, 272, and authorities there cited. Under the law of Montana an action of claim and delivery, or trover, would lie against a Sheriff who wrongfully takes possession of personal property under a writ of attachment. Griswold vs. Boley, 1 Mon. 546; Boley vs. Griswold, 20 Wall. 486; Sweeney vs. Lomme, 22 Wall. 213; and it has been frequently decided that an action of replevin, or of claim and delivery might be maintained by the mortgagee of personal property against an officer, who, under a writ of attachment in a suit against the mortgagor, levied upon and took the property from the possession of the mortgagee; Morris vs. McCanna, 29 Fed. Rep. 757; Rankin vs. Greer,

38 Kan., 343; Sherman vs. Finch, 71 Cal., 68; Stevenson vs. Lord, 25 Pac. Rep., 313; Morrill vs. Denton, 73 Mich., 628; Wood vs. Weimar, 104 U. S., 786; Whitney vs. Swensen, 43 Minn., 337.

The action of replevin was formerly brought to test the legality of a distress and could not be maintained in any other case; but under the statutes and more modern decisions of the various Courts the action can now be sustained for any wrongful taking or unlawful detention of the personal goods and property of another. This action belongs to the same class as trespass, trover and detinue. The governing principles controlling each of these actions being in many respects analogous; but the form of proceeding is in some respects different. The common law action of replevin is in several States superseded by the action of claim and delivery which takes its place and is controlled by statutory provisions embracing some of the essential features of replevin and trover. When the personal property has been disposed of and cannot be recovered the action of trover would furnish an adequate remedy; but in an action for claim and delivery, as in replevin, when it appears upon the trial that an actual delivery of the goods cannot be had the Court might, especially in cases where no objection is made on this ground, render a judgment only for the value of the goods and damages for the detention thereof. Morris on Replevin S. 774; Boley vs. Griswold, supra; McGraw vs. Franklin, 25 Pac. Rep. 911, or the Court might, as it did in this case, render an alternative judgment which could be enforced as a money judgment. Morris on Replevin, S. 509, 772.

At the close of the trial it appearing that there was a defect in the statutory undertaking for the issuance of the writ of attachment in the suit of the First National Bank of Helena vs. Landsman & Co., the Court charged the jury that the attachment was void, and that Jefferis could not, therefore, justify under it; "that his defense that the mortgage to Oliver was fraudulent * * * as to the creditors for whom he acted fails, and you must not consider any of the evidence upon the point as to whether the mortgage to Oliver for plaintiffs was in fraud of creditors or not." This ruling of the Court was in conformity with the decisions of the Supreme Court of Montana, to the effect that when a Sheriff by virtue of a writ of attachment or execution levies upon the property in the possession of, and claimed by a third person who is a stranger to the writ, he cannot justify his seizure of the property by attacking the sale to the party in possession as fraudulent against creditors, without showing that all the preliminary proceedings were regular and sufficient to authorize the issuance of the writ. Hootman vs. Bray,

3 Mon., 409; Ford vs. McMaster, 6 Mon., 240; Marcum vs. Coleman, 8 Mon. 196; Palmer vs. McMaster, 10 Mon. 390. The same principle is announced in the Courts of several other states. But it is opposed to the law as applied to the processes and officers of the United States Court as held in Matthews vs. Densmore, 109 U. S. 216. But be that as it may, it is our opinion that the action of the Court in withdrawing the question of fraud in the sale of the goods by Landsman to Oliver should have been sustained upon the ground that there was no allegation in the pleadings that would have permitted the question of actual fraud to be submitted to the jury.

The charge of the Court must be construed with reference to the fraud as alleged in the pleadings. There are no averments in any of defendant's answers that the sale of the goods to Oliver was made with the intent to hinder, delay or defraud creditors. The only averment of actual fraud is that Oliver, after the bill of sale had been executed, used the same fraudulently and falsely to gain a secret advantage against other creditors of the said Landsman & Co. by insisting and claiming that there was due to the creditors for whom he was acting the full sum of twelve thousand, five hundred dollars—the amount mentioned in the bill of sale; that the said Landsman & Co. were not indebted to said creditors in any amount exceeding the sum of seven thousand, seven hundred and forty-one 87-100 dollars, and that said Oliver used, and intended to use, the said bill of sale "to work a fraud and extort money." No fraud whatever is alleged against Landsman & Co.

The fraud charged relates solely to the fact that Oliver attempted to make an improper use of the bill of sale. If the allegation of fraud by Oliver is admitted to be true the defendant Jefferis could not justify under the writ of attachment however regular all the proceedings might have been without first showing that a tender was made to Oliver of the amount admitted to be actually due to the creditors for whom Oliver acted prior to, or at the time of the levy of the writ of attachment. No such proof appears in the record. The verdict of the jury fixed the value of the goods at $7,741.87 for the Chicago plaintiffs and $108.85 for plaintiffs Turner & Burleigh, amounting in all to $7,850.66. It does not, therefore, affirmatively appear that defendant was injured or prejudiced in any manner by the charge of the Court withdrawing the question of fraud, as alleged in the pleadings from the consideration of the jury.

We deem it unnecessary to discuss the questions presented in the other assignments of error. It is enough to say that we have carefully examined the same and find them untenable.

The judgment of the Circuit Court is affirmed.